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CITATIONS

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1290

UNITED STATES OF AMERICA, PETITIONER

v.

ITT CONTINENTAL BAKING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-10A) is reported at 485 F. 2d 16. The district court's findings of fact and conclusions of law (Pet. App. 12A-16A; 1972 CCH Trade Cases, ¶73,993) are not officially reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 11A) was entered on September 24, 1973. On December 17, 1973, Mr. Justice White extended the time for filing a petition for a writ of certiorari to January 22, 1974. On January 14, 1974, the time for filing was further extended by Mr. Justice White to and including Febru-

ary 21, 1974, and the petition was filed on that date. The petition was granted on April 29, 1974 (App. 135). The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a firm which violates a Federal Trade Commission consent order prohibiting acquisitions is subject, under the civil penalty provisions of the Clayton and Federal Trade Commission Acts (15 U.S.C. 21(*l*), 45(*l*)), to daily penalties for each day it continues to hold the unlawfully-acquired assets.

STATUTES INVOLVED

Section 11(*l*) of the Clayton Act (38 Stat. 734, as amended, 15 U.S.C. 21(*l*)) provides:

> Any person who violates any order issued by the commission or board under subsection (b) of this section after such order has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of any such order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the commission or board each day of continuance of such failure or neglect shall be deemed a separate offense.

Section 5(*l*) of the Federal Trade Commission Act (38 Stat. 719, as amended, 15 U.S.C. 45(*l*)) provides:[1]

[1] Subsequent to the decision below, Congress amended Section 5(*l*) of the Federal Trade Commission Act by increasing the amount of the maximum civil penalty for each violation of a

Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure to obey or neglect to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

Section 7 of the Clayton Act (38 Stat. 731, as amended, 15 U.S.C. 18) provides in pertinent part:

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Commission order from $5,000 to $10,000, and by expressly empowering district courts to grant equitable relief in civil penalty cases. P.L. 93–153, Section 408(c), 87 Stat. 591.

STATEMENT

1. THE COMMISSION PROCEEDINGS AND CONSENT ORDER

In 1960 the Federal Trade Commission issued an administrative complaint (App. 61–71) against Continental Baking Company ("Continental"). The complaint charged, *inter alia,* that Continental's acquisitions of several baking companies violated Section 7 of the Clayton Act (38 Stat. 731, as amended, 15 U.S.C. 18) and Section 5 of the Federal Trade Commission Act (38 Stat. 719, as amended, 15 U.S.C. 45).[2]

The complaint alleged, *inter alia,* that the acquisitions "substantially lessened actual and potential competition throughout the country in the manufacture, sale and distribution of bread;" "eliminated [the acquired firms] * * * as independent competitive factors in the manufacture, sale and distribution of bread;" and "significantly increased the trend to industry-wide concentration of the manufacture and sale of bread" (App. 67–68).

Two years later, while the proceeding was still before the hearing examiner, the parties agreed (App. 72–84) to settle the case by a proposed consent order. Under the order, Continental agreed not to make further acquisitions in the bread industry for ten years without the Commission's prior approval and to divest one of the baking firms it had acquired.

[2] Section 5(a)(1) of the Federal Trade Commission Act declares unlawful "[u]nfair methods of competition in commerce, and unfair * * * acts or practices in commerce * * *."

In an appendix specifically incorporated by reference into their agreement to terminate the litigation by adoption of the consent order, the parties stated that "[o]ne of the principal problems in the baking industry is the tendency towards concentration and the continuous growth of major baking companies through acquisition. Such acquisitional growth and tendency towards concentration places in the hands of a few large companies the means to set the pattern of competition, not only among themselves, but also for all local baking companies serving any given area" (App. 84). If the proposed order were adopted, the parties said, Continental's "alleged continuous practice of acquiring companies baking and selling bread * * * will be brought to a halt" (*ibid.*). The parties also agreed that "[t]he complaint may be used in construing the terms of the order" (App. 73).

As recommended by the hearing examiner (App. 85–89), the Commission, in May 1962, approved the agreement and adopted the consent order (App. 32).

The order prohibited Continental for 10 years "from acquiring, directly or indirectly, * * * the whole or any part of the stock, share capital, or assets of any concern * * * engaged * * * in the production and sale of bread" without the Commission's prior approval.[3]

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[3] The section of the order barring acquisitions provides in full (App. 32):

> IT IS FURTHER ORDERED, That for a period of ten (10) years from the date of issuance of this order by the Federal Trade Commission respondent shall cease and desist from

2. THE COURT PROCEEDINGS

a. *The district court proceeding.* After the cease-and-desist order became final, Continental, without obtaining the Commission's prior approval, entered into agreements with three independent producers and sellers of bread by which Continental acquired their market share or sales volume.[4] In December 1968, pursuant to the Commission's recommendation, the United States brought this suit under Section 11(*l*) of the Clayton Act and Section 5(*l*) of the Federal Trade Commission Act, alleging that Continental's transactions with the three local bakeries violated the order's

> acquiring, directly or indirectly, through subsidiaries or otherwise, the whole or any part of the stock, share capital, or assets of any concern, corporate or noncorporate, engaged in any state of the United States in the production and sale of bread and bread-type rolls unless the Commission, on petition for modification of this Section III of this order permits such an acquisition by respondent, said modification to be within the sole and final discretion of the Federal Trade Commission.

The order also required Continental to divest one of the baking firms it had acquired. Continental complied with that provision, and it is not involved in this case.

[4] The three transactions which the court of appeals held constituted acquisitions prohibited by the order are summarized in the court of appeals' opinion (Pet. App. 4A–7A), and are set forth in greater detail in the stipulation of facts the parties submitted to the district court (App. 35–51). Respondent did not cross-petition for a writ of certiorari to review the court of appeals' holding that the three transactions challenged in the complaint violated the order. Whether the challenged transactions violated the order, therefore, is not before the Court in this case, and we do not address it in this brief. See *infra*, p. 25.

ban on acquisitions.[5] The complaint (App. 14–20) sought civil penalties of $1,000 per day from the date of each acquisition to the date the complaint was filed, an injunction commanding future compliance with the order, and such further relief as the court deemed appropriate.[6]

The case was submitted to the district court upon stipulated facts (App. 29–60). The court held that Continental's transactions with two of the three firms constituted acquisitions prohibited by the order, but that its transactions with the third firm did not (Pet. App. 14A–15A).

The district court denied the government's request for daily penalties for the acquisitions it held unlawful. The court concluded "that the terms of the consent order proscribe only the act of acquisition and that the violations of the consent order * * * did not constitute a 'continuing failure or neglect to obey' said order [within the meaning of the civil penalty statutes]. * * * Once these two acquisitions were accomplished, the violations were complete" (Pet. App. 15A).[7]

[5] In September 1968, shortly before the complaint was filed, Continental merged with International Telephone and Telegraph Corporation ("ITT"). Pursuant to the merger agreement Continental ceased to exist, and its business has since been conducted by ITT Continental Baking Company ("ITT Continental"), a wholly-owned subsidiary of ITT, created for that purpose (App. 32–34). The suit was therefore brought against ITT Continental.

[6] The government later specifically requested divestiture (App. 26–27).

[7] Other issues presented to the district court were whether the Commission is required to notify a person subject to an

The court imposed the maximum single civil penalty of $5,000 for each of the two "separate" violations it found, and entered an injunction commanding ITT Continental to comply with the terms of the consent order until it expired[8] (Pet. App. 16A, 17A). It

order that it is in violation of the order before continuing penalties may be imposed; whether the district court had the power to grant injunctive relief in a civil penalty proceeding; and whether ITT Continental is a "successor" to Continental and assumed Continental's liabilities under the order (see App. 26–28).

Since the district court ruled that the violations were not continuing, it did not rule on the notice issue, but expressed the view that it would seem unreasonable for the Commission knowingly to permit daily penalties to accrue without giving notice of its position at the earliest reasonable time (Pet. App. 15A).

The court held that it had the power to grant equitable relief (*id.* at 15A–16A). As noted above (*supra*, n. 1), Congress has since expressly authorized district courts to grant such relief in Section 5(*l*) civil penalty actions.

Finally, the court ruled that ITT Continental is a successor of Continental and that ITT Continental "assumed the liabilities of Continental Baking Company including the liabilities under the Federal Trade Commission consent order" (Pet. App. 16A).

[8] The consent order was scheduled to expire by its own terms on May 15, 1972, and the district court's injunction ran only until that date.

In April 1972, the Commission issued an order requiring ITT Continental to show cause why the order's ban on acquisitions should not be extended until April 1977. On December 12, 1973, following hearings, the administrative law judge filed an opinion recommending that the ban on acquisitions be extended to April 13, 1977. The case is currently pending before the Commission on ITT Continental's appeal.

declined, however, to order ITT Continental to divest the assets acquired in violation of the order.

b. *The court of appeals' decision.* Both parties appealed. The court of appeals reversed the district court's ruling that Continental's transactions with the third firm did not constitute an acquisition in violation of the order and remanded the case to the district court for the imposition of an appropriate "single" civil penalty for that violation. It affirmed in all other respects.[9]

The court of appeals, citing *United States* v. *Armour & Co.,* 402 U.S. 673, held that the scope of the consent order must be discerned within its "four corners" (*id.* at 682), and that the order must be construed "as it is written" (*ibid.*). Under this standard, the court of appeals reasoned, the order must be construed as prohibiting only the "act" of acquisition, and not the continued retention of assets acquired contrary to its terms (Pet. App. 8A–9A). The court thus adopted respondent's contention that since the order proscribes only the acquisition of specified assets but not the "holding" of such assets, it is not a violation of the order for respondent to retain the assets it had unlawfully acquired (see Pet. App. 8A).

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[9] The court of appeals had previously denied respondent's motion to dismiss the appeal on the ground that under the Expediting Act, 15 U.S.C. 29, the appeal lay only to this Court. 462 F. 2d 1104.

ARGUMENT

UNDER THE PENALTY PROVISIONS OF SECTION 5(*l*) OF THE FEDERAL TRADE COMMISSION ACT AND SECTION 11 (*l*) OF THE CLAYTON ACT, THE RETENTION OF PROPERTY ACQUIRED IN VIOLATION OF A FEDERAL TRADE COMMISSION ORDER PROHIBITING SUCH ACQUISITION IS A CONTINUING OFFENSE SUBJECT TO A SEPARATE PENALTY FOR EACH DAY THE ILLEGALLY-ACQUIRED PROPERTY IS RETAINED

A. INTRODUCTION AND SUMMARY OF ARGUMENT

Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. 45(*l*), and Section 11(*l*) of the Clayton Act, 15 U.S.C. 21(*l*), provide in relevant part that any person who violates a final order of the Commission shall be liable for civil penalties of not more than $5,000 for each violation (now $10,000 if the proceeding is brought under Section 5(*l*)). Sections 5(*l*) and 11(*l*) also provide that "[e]ach separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense." The issue presented by this case is whether the retention of property acquired in violation of a Commission order prohibiting such acquisitions is a continuing offense subject to a separate penalty for each day the illegally-acquired assets are retained.

In recent years the Federal Trade Commission has included in its orders in appropriate cases provisions barring further acquisitions (usually for a limited

period) without prior Commission approval.[10] Such remedial provisions have two broad purposes, both of which supplement the Commission's authority to enforce the antitrust laws. First, they permit the Commission to withhold approval of particular acquisitions inconsistent with the remedial objectives of the order, even though, if viewed separately, the acquisitions might not themselves violate the antitrust laws.[11] Second, they eliminate the problems that inhere in divestiture proceedings by affording the Commission an opportunity to assess the competitive effects of a proposed acquisition before it is consummated. The validity of such future non-acquisition provisions is now established. *Abex Corporation* v. *Federal Trade Commission*, 420 F. 2d 928, 933 (C.A. 6), certiorari denied, 400 U.S. 865; *Seeburg Corporation* v. *Federal Trade Commission*, 425 F. 2d 124, 129 (C.A. 6), certiorari denied, 400 U.S. 866; cf. *Ekco Products Company* v. *Federal Trade Commission*, 347 F. 2d 745, 753 (C.A. 7).

[10] The non-acquisition orders in force as of February 1, 1974 are listed at Pet. App. 18A–22A.

[11] As their terms make plain, the Commission's non-acquisition orders do not prohibit absolutely all acquisitions by the firms subject to them. Thus, in *In the Matter of Beatrice Foods Co.*, 67 F.T.C. 473, 731, n. 48, the Commission explained that:

> * * * an order forbidding future acquisitions without prior approval by the Commission is in no sense an absolute ban on such acquisitions. In deciding whether or not to approve a proposed acquisition submitted under such an order, the Commission is not free to act capriciously or unreasonably. It may deny approval only where the acquisition, if consummated, would conflict with the remedial objectives of the order.

There are currently in force 67 of these non-acquisition orders (see Pet. App. 18A–22A [12]). Whether entered after litigation or upon consent, these orders, like Section 7 of the Clayton Act itself, prohibit acquisitions but do not expressly bar the "holding" of stock or assets after they are acquired.

The question presented in this case is of basic importance to the enforcement of these non-acquisition orders. As the Court of Appeals for the Eight Circuit recently stated in *United States* v. *Beatrice Foods Co.*, 493 F.2d 1259, petition for certiorari pending, No. 73–1798,[13] the Tenth Circuit's construction of the typical non-acquisition order "ignores the crucial *effects* of an acquisition and would render non-acquisition orders virtually meaningless" (Supp. Mem. 22, footnote omitted, emphasis added).

If Commission non-acquisition orders are to achieve their basic purpose—to require the firms subject to

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[12] The list of non-acquisition orders appearing at Pet. App. 18A–22A identifies such orders as of February 1, 1974. Since that date two orders have expired: the order against the Borden Company in Docket No. 6652 (Pet. App. 18A), and the order against Broadway-Hale Stores, Inc. in Docket No. C–1057 (Pet. App. 19A). In addition, one litigated non-acquisition order (Kennecott Copper Corp., Docket No. 8765, which will expire in 1984), and two consent non-acquisition orders (Pepsi Co., Inc., Docket No. 8903 and St. Joe Minerals Corp., Docket No. 8892, which will expire in 1984 and 1977, respectively) have since become final.

As of May 20, 1974, fifty-four of these are consent orders of which 28 have at least five more years to run.

[13] The Eighth Circuit's opinion is reproduced as an appendix to the government's Supplemental Memorandum ("Supp. Mem.") filed in this Court on March 21, 1974.

them to obtain the Commission's approval for acquisitions prior to consummation—there must be an effective incentive for compliance with them. Congress has provided that incentive in the form of civil penalties for violation of Commission orders. The purpose of these sanctions is to deter disobedience of the Commission's orders by making non-compliance costly. By effectively eliminating the threat that violations of non-acquisition orders may result in substantial civil penalties, the Tenth Circuit's ruling removes the most effective incentive for compliance; it converts the prohibition against further acquisitions into a minor additional cost, thus defeating the deterrent purpose of the daily penalties prescribed by Congress.

Under the decision of the court of appeals, the major sanction now available to the courts to deal with properties illegally acquired in violation of Commission orders is merely to require divestiture. That remedy, however, which comes after the illegal transaction has been consummated, is fraught with difficulties, delays, economic costs to the public, and sometimes is rendered wholly impractical by subsequent events.[14] The threat of a $10,000 penalty and a possible divestiture is unlikely to have any significant effect as a deterrent of illegal acquisitions. It is not what Congress intended to accomplish when it provided for penalties [of up to $10,000 a day] for each day of a

[14] See, *United States* v. *First City National Bank of Houston*, 386 U.S. 361, 370–371; *Utah Public Service Commission* v. *El Paso Natural Gas Co.*, 395 U.S. 464.

continuing offense.[15] The effect of the ruling below is to encourage a firm contemplating an acquisition that may violate a non-acquisition order to make the acquisition and take its chances, instead of complying with the order by first seeking Commission approval.[16]

Our submission that the retention of illegally acquired assets constitutes a continuing violation giving rise to daily penalties is consistent not only with the purpose of the civil penalty statutes but also with established principles under Section 7 of the Clayton Act, which the Commission order in this case was designed to implement. In *United States* v. *du Pont,* 353 U.S. 586, this Court held that the purpose of Section 7 was to arrest the effects of an illegal acquisition (353 U.S. at 596–597). In so holding, the Court rejected the contention of the dissenting opinion that the violation was complete when the act of acquisition occurred (*id.* at 620). Commission orders prohibiting acquisitions without the prior approval of the Commission are, like Section 7, intended to prevent the effects of an illegal

[15] The amount of the penalties to be imposed is within the discretion of the district court, but may not exceed the statutory maximum. As the district court observed in the *Beatrice Foods* case: "Penalties could range * * * from $5,000 [now $10,000] a day down to zero or $1.00 a day." 322 F. Supp. 139, 141 (D. Minn.).

[16] Compliance in the context of these orders simply means seeking the Commission's prior approval for a proposed acquisition (see *supra*, n. 11). In addition, the Commission's rules provide that, upon request, the Commission will advise a party whether a proposed course of action would comply with an order. 16 C.F.R. 3.61(d).

acquisition and retention of illegally acquired assets therefore constitutes a continuing violation of such an order.

This Court's decision in *United States* v. *Armour & Co.*, 402 U.S. 673, is not controlling in this case. In *Armour*, this Court held that the government's contention as to the purpose of the consent decree there involved was not supported by analysis of its provisions. Thus, the Court held, the decree did not bar the acquisition by a non-party of a controlling interest in a party, because the terms of the decree did not prohibit the relationship. There is nothing contained in the Commission order in this case which suggests that the prohibition on acquisitions is limited to the act of acquisition.

Finally, respondent has indicated in the opposition to our petition for a writ of certiorari that it will seek to present certain issues for resolution by this Court. As we discuss more fully at pp. 25–27, *infra*, these issues are not properly before the Court.

B. A COMMISSION ORDER PROHIBITING FUTURE ACQUISITIONS BARS NOT MERELY THE ACQUISITION BUT ALSO THE RETENTION OF THE ILLEGALLY-ACQUIRED PROPERTY.

In Section 7 of the Clayton Act, Congress prohibited acquisitions whose "effect * * * may be substantially to lessen competition." There is nothing intrinsically anticompetitive about an acquisition itself. The evil Congress sought to prevent was the

probable anticompetitive effect of certain acquistions, and the remedy Congress selected to accomplish that objective was to prohibit them.

An acquisition is likely to have anticompetitive effects where, as a result of acquiring control of another firm or its assets, the acquiring firm is in a position that may adversely affect the competitive structure of the industry. In Section 7, Congress sought to bar in their incipiency the injuries to competition that are likely to result from such changes in market structure.[17]

The obvious purpose of an order barring future acquisitions is to prevent the anticompetitive effect which such acquisitions are likely to cause. The mere acquisition itself cannot produce anticompetitive effects; they result from the change in market structure that the continued retention of the acquired firm or its assets produces. Accordingly, if the Commission order prohibiting future acquisitions is to perform a meaningful function in effectuating the purposes of Section 7, it must be construed to prohibit not just the acquisition but also the retention of the illegally acquired property, since it is that retention that gives rise to whatever anticompetitive effect the acquisition may have.

Thus, by retaining the assets which the Commission order prohibited it from acquiring, respondent committed a "failure to obey" the order barring the

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[17] See *e.g.*, *United States* v. *du Pont & Co.*, 353 U.S. 586, 589; *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 317; *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 362.

acquisition, within the meaning of the penalty provisions of the statute.

Indeed, Continental itself recognized that this was the intention of the order when it agreed to settle the litigation through entry of the consent order. The parties stated that "[o]ne of the principal problems in the baking industry is the tendency towards concentration and the continuous growth of major baking companies through acquisition," that this "places in the hands of a few large companies the means to set the pattern of competition, not only among themselves, but also for all local baking companies serving any given area," and that under the consent order Continental's "alleged continuous practice of acquiring companies baking and selling bread * * * will be brought to a halt" (App. 84). The agreed purpose of the order—halting Continental's role in the industry's "tendency towards concentration and the continuous growth of major baking companies through acquisition"—would be wholly defeated if the order prohibited only the acquisition but not the retention of the specified firms or their assets.

This Court has recognized that the prohibitions of Section 7 are directed against the effects of an acquisition and not just the acquisition itself. In *United States v. du Pont & Co.*, 353 U.S. 586, the Court held that the legality of du Pont's acquisition of General Motors' stock should be determined by assessing its effects at the time the government brought suit (1949) rather than at the time of acquisition (1917–1919). In so holding, the Court expressly rejected the argument

that "the Government could not maintain this action in 1949 because § 7 is applicable only to the acquisition of stock and not to the holding or subsequent use of the stock" (353 U.S. at 596–597). It explained that the argument was misconceived because the aim of Section 7 "was primarily to arrest apprehended consequences of intercorporate relationships before those relationships could work their evil, which may be at or any time after the acquisition * * *" (*id.* at 597).

The Court so ruled over a strong dissent which argued that the majority had amended Section 7 to extend it to prohibit the continued holding of stock whenever the effect of such continued holding may be substantially to lessen competition. "But," the dissent asserted, "the fact of continued holding does not allow the Government to dispense with the necessity of proving that the stock was unlawfully acquired. The offense described by § 7 is the acquisition, not the holding or the use, of stock. When the acquisition has been made, the offense, if any, is complete" (*id.* at 620). The dissent's limited construction of Section 7, which the Court rejected, parallels the district court's construction of the order in this case ("[o]nce these two acquisitions were accomplished, the violations were complete"), which the Tenth Circuit approved (Pet. App. 8A–9A).

The Second Circuit has also recognized that Section 7 is directed against the anticompetitive relationships resulting from an acquisition and not just the acquisition itself. *Gottesman* v. *General Motors Corp.*, 414 F. 2d 956. That case was a private treble damage

action based in part on du Pont's acquisition of General Motors' stock which this Court, in *United States v. du Pont & Co., supra,* held violated Section 7 of the Clayton Act. In ruling that the district court had given insufficient weight to the judgment entered in the government's litigation against du Pont, the court stated (414 F. 2d at 965): "[T]he very acquisition and position of potential control which was found violative of the Clayton Act as of 1949 continued through 1961. We need not dispute the statement of the district court that, in the ordinary antitrust case, there is no 'presumption of continuance of unlawful conduct' * * *. Here, however, what was unlawful was du Pont's status as stockholder in General Motors, and that status continued until divestiture."

The same reasoning, we submit, requires that the Commission's order prohibiting future acquisitions be construed to cover not just the acquisition but also the retention of the illegally acquired assets. Like Section 7 itself, the Commission's order was designed "primarily to arrest apprehended consequences of intercorporate relationships before those relationships could work their evil, which may be at or any time after the acquisition * * *" (*du Pont, supra,* 353 U.S. at 597). The Commission's order, no less than the underlying statute it implements, should be interpreted in a way that accomplishes rather than defeats its purpose. That objective can be accomplished only if the order is given the common sense interpretation of prohibiting the continued retention of assets that have been illegally acquired in violation of the order.

ITT Continental has pointed out (Br. in Opp. 9) that some judicial consent decrees enjoin both the acquisition and holding of specified stock or assets. We submit, however, that these judicial decrees do not aid respondent because, in the context of a court decree, this additional ban on "holding" adds nothing to the injunction against "acquiring." The making of a prohibited acquisition would be a contempt of court, and the court could assess whatever penalties it deemed appropriate, without regard to whether the decree expressly enjoined "holding" unlawfully acquired properties. Moreover, the contempt would continue for as long as the defendant held such properties. This is precisely the teaching of the Second Circuit's decision in *United States* v. *Schine,* 260 F. 2d 552, certiorari denied, 358 U.S. 934.[18]

In the penalty provisions of the Clayton and Federal Trade Commission Acts, Congress has adopted the same philosophy by providing that each day of continuing failure to obey a Commission order is a separate offense.

[18] In *Schine*, respondents in a contempt proceeding had been found by the district court to have violated several injunctive provisions of an antitrust decree by, among other things, acquiring interests in theaters without court approval. One of the grounds upon which the respondents attacked the findings of violations was that the activities all occurred prior to the period of the statute of limitations. The Second Circuit rejected this contention (260 F. 2d at 555–556): "[A]lthough the initial acts in contempt of the decree occurred prior to the statutory period, the 'illegal' conditions which they created continued up to the date of the order to show cause and resulted in what might be called 'continuing contempts.' Here * * * it is the maintenance of conditions in violation of the decree which is the charge against the respondents."

C. THE LEGISLATIVE HISTORY OF THE PENALTY PROVISIONS CONFIRMS THAT EACH DAY OF RETENTION OF ASSETS ACQUIRED IN VIOLATION OF A COMMISSION ORDER IS A SEPARATE OFFENSE.

The civil penalty provisions involved in this case first appeared in the Wheeler-Lea Act of 1938 (52 Stat. 111), which generally amended the review and enforcement procedures of the Federal Trade Commission Act. That Act substituted for the previously existing provisions for court review and enforcement of Commission orders the provision that, after a Commission order had become final as provided in the statute, a violation of such order subjected the respondent to a civil penalty of not more than $5,000. The stated purpose of the penalty provision was to "enforce obedience to the Commission's orders to cease and desist * * *." H. Rep. No. 1613, 75th Cong., 1st Sess., p. 4. By the Clayton Finality Act of 1959 (73 Stat. 243), the penalty provision was made applicable to Commission orders under the Clayton Act. See *Federal Trade Commission* v. *Jantzen, Inc.*, 386 U.S. 228.

Initially, the penalty sections of both Acts did not contain the present continuing-offense provisions. Those were added to the Federal Trade Commission Act in 1950, and to the Clayton Act in 1959. When Congress was considering the addition of the continuing penalty provision to the Federal Trade Commission Act in 1950, the Commission's staff advised Congress by letter that the proposed amendment "simply provides that in those infrequent cases where the violation is a single act or course of conduct continuing over a period of time the government is not limited to a maximum penalty of $5,000, and may seek

a daily penalty" (letter to Sen. Fulbright from W. T. Kelley, General Counsel, Federal Trade Commission, dated March 7, 1950, 96 Cong. Rec. 2974). The letter cited two situations in which the continuing penalty provisions were believed necessary, neither of which is here applicable: (1) violations of an order against false advertising where the false advertisement is placed on a billboard; and (2) violations of an order against conspiracies in restraint of trade. *Ibid.*; see also 96 Cong. Rec. 2981.

When Congress in 1959 extended the civil penalty provisions to the Clayton Act, these same two situations were brought to its attention. Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary on the Finality of Clayton Act Orders, 86th Cong., 1st Sess., p. 21. More significantly for this case, however, the House Committee Report on that bill stated that "unless the maximum penalty applied and each day of a continuing violation considered [sic] a separate offense, an order dissolving an unlawful merger could be ignored after the mere payment of a $5,000 fine." H. Rep. No. 580, 86th Cong., 1st Sess., p. 7.

Congress did not otherwise focus upon the issue in this case, whether the continuing penalty provision applies to the retention of assets acquired in violation of a Commission order. If, however, as the legislative history shows, Congress intended that failure to obey a Commission order dissolving an unlawful merger was a continuing offense, *a fortiori* it would be a continuing offense to retain assets that had been acquired in violation of an outstanding order prohibiting their

acquisition. In each instance, the substantial penalties that can be imposed only if each day of the retention of the illegally held assets is viewed as a separate offense are necessary if compliance with Commission orders is to be assured.

D. *UNITED STATES V. ARMOUR & CO* 402 U.S. 673, DOES NOT ESTABLISH THAT THE NON-ACQUISITION CONSENT ORDER PROHIBITS ONLY THE ACQUISITION, BUT NOT THE RETENTION OF THE ILLEGALLY-ACQUIRED ASSETS.

The court of appeals concluded that *United States v. Armour & Co.*, 402 U.S. 673, required that the consent order be construed as prohibiting only acquisitions, but not retention of the illegally acquired assets. It stressed (Pet. App. 3A, 9A) the language in that opinion that "the scope of a consent decree must be discerned within its four corners" and that the decree "must be construed as it is written * * *" (402 U.S. at 682). Since the order in this case prohibited only the acquisition but not "the acquisition and retention" of assets, the court of appeals read it as "not extend[ing] to the holding of assets acquired contrary to the order" (Pet. App. 9A).

The court's reliance on *Armour* was misplaced and that decision does not support its unrealistic interpretation of the Commission's order.

In *Armour*, the government contended that Greyhound's acquisition of Armour violated the Meat Packers Consent Decree of 1920. That decree enjoined the defendants, including *Armour*, from engaging in certain lines of business, including specified food products, and from owning any interests in businesses

which dealt in those products (402 U.S. at 676). The government's claim was that, since the decree would have barred Armour from acquiring Greyhound, because the latter was engaged in the retail food business, it also barred Greyhound from acquiring Armour on the theory that that acquisition would circumvent "the decree's purported purpose of separating the meatpackers from the retail food business" (*id.* at 677).

The Court rejected that claim, ruling that the decree "does not effect a complete separation, but, rather, prohibits particular actions and relationships not including the one here in question. * * * [T]he decree does not speak in terms of relationships in general, but rather prohibits certain behavior, and in doing so prohibits some but not all economic interrelationship between Armour and the retail food business" (402 U.S. at 677–678). The decree contained "* * * no prohibition against selling any interest to a grocery firm * * *" (*id.* at 679). It was in the light of that interpretation of the decree that the Court used the language upon which the court of appeals relied, in rejecting the government's argument that Greyhound's acquisition of Armour would frustrate the purposes of the decree (*id.* at 680–681).

There is nothing in the Commission's consent order to show that it was intended to bar only the acquisition and not the retention of illegally-acquired assets. The government is not attempting to extend the order to a situation it does not cover, but only to give the language its

natural and intended meaning. *Armour* would be pertinent if the government were contending that the order bars another firm from acquiring Continental. But it does not shed any light on, let alone determine, the question of what constitutes "failure to obey" an order prohibiting acquisitions without prior Commission approval.

E. ITT CONTINENTAL'S OTHER CONTENTIONS ARE NOT PROPERLY BEFORE THE COURT AND IT SHOULD NOT CONSIDER THEM

Respondent urged (Br. in Opp. 2, 13–14) that if the Court granted the petition, it also would have to decide (1) whether the agreements between Continental and the three local bakeries constituted acquisitions prohibited by the order, (2) whether ITT Continental is a "successor" to Continental and assumed its liabilities under the order, and (3) whether daily penalties may be assessed for the period after the Commission learns that its order is being violated but does not provide notice to the party that it is violating the order.

With respect to the first two contentions, they are not properly before this Court because respondent did not file a cross-petition for a writ of certiorari to review them. See *Brennan* v. *Arnheim & Neely, Inc.*, 410 U.S. 512, 516; *National Labor Relations Board* v. *International Van Lines*, 409 U.S. 48, 52, n. 4; *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 381, n. 4. These arguments cannot be urged as alternative grounds for affirmance of the court of appeals' judgment, since their acceptance would result not in affirmance but in substantial modification of that judgment.

The court of appeals' judgment affirmed the district court's judgment that Continental's arrangements with two of the three local bakeries were acquisitions prohibited by the order, and it reversed the district court's judgment that the arrangement with the third local bakery was not. If ITT Continental's contention that the arrangements with the three local bakeries were not acquisitions prohibited by the the order were to prevail, that would require a reversal, not an affirmance, of the court of appeals' judgment.

Similarly, if ITT Continental's contention that it is not a successor to Continental were to prevail, that would not result in affirmance of the court of appeals' judgment. If ITT Continental is not a successor of Continental, then, theoretically at least, no penalties should have been assessed against it. However, as reflected in both the district court's findings and conclusions (Pet. App. 16A) and the court of appeals' opinion (Pet. App. 7A–8A), ITT Continental conceded its liability for violations of the order incurred by Continental prior to the date of its merger with ITT Continental. Thus, acceptance of ITT Continental's contention that it is not subject to penalties because it is not a successor of Continental would result in a reversal of the court of appeals' judgment that ITT Continental is liable for single civil penalties for each of the prohibited acquisitions; or, if ITT Continental's concession of liability for penalties that Continental may have incurred is controlling, accept-

ance of its successorship contention would result in a ruling terminating its liability, if the violations are held to be continuing, as of the date it merged with Continental. An affirmance of the court of appeals' judgment would not result in either situation.

Whether daily penalties may be assessed for the period after the Commission became aware of the violations, but prior to giving Continental notice thereof, was not decided either by the district court or the court of appeals because of their conclusion that daily penalties are not assessable. This Court need not consider that question. If the Court agrees with us that daily penalties are assessable, the duration of such penalties and their amount is a matter for the district court to determine in the first instance based upon the record before it.

Accordingly, there is no occasion for this Court in this case to reach the three additional questions which respondent poses. If this Court agrees that the violations here are continuing and remands for the imposition of daily penalties, it would not be open to ITT Continental to relitigate the question whether it is bound by the order. The district court held that it is bound by the order, the court of appeals' judgment affirmed that ruling (although its opinion did not specifically address that issue), and ITT Continental did not seek further review of that judgment in this Court by filing a petition or cross-petition for a writ of certiorari.

CONCLUSION

The part of the court of appeals' judgment which affirmed the district court's ruling that the prohibited acquisitions constituted single violations of the order should be reversed, and the case should be remanded to the district court to consider the imposition of appropriate daily civil penalties for the violations.

Respectfully submitted.

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